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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORTHERN TELECOM INC.,
a Delaware corporation,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.*
THEODORE R. ANDERSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AND THE ELECTRONIC INDUSTRIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NORTHERN TELECOM'S PETITION FOR CERTIORARI

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Aerospace Industries Association of America, Inc. and the Electronic Industries Association, as *amici curiae* pursuant to Supreme Court Rule 37.2, urge that the Court

grant Northern Telecom's petition for a writ of certiorari filed in this case.

This *amici curiae* brief is filed with the consent of both Petitioner, Northern Telecom Inc., and Respondent, Theodore R. Anderson.

I

AMICI CURIAE REPRESENT MANY OF THE LARGEST COMPANIES IN THE UNITED STATES, MOST OF WHOM ENGAGE IN SUBSTANTIAL SALES OF PRODUCTS AND SERVICES TO THE UNITED STATES GOVERNMENT IN TRANSACTIONS SUBJECT TO THE FALSE CLAIMS ACT.

Aerospace Industries Association of America, Inc. ("AIA") is a national, non-profit trade association representing the nation's manufacturers of commercial, military and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. AIA is comprised of forty-nine member companies, including many of the nation's largest corporations.

Virtually all of AIA's member companies provide goods and services under contract to the Federal Government, with many of the member companies deriving a significant portion of their business from those contracts. Many AIA members, therefore, are potentially exposed to claims under the False Claims Act, 31 U.S.C. §§ 3729-3733 (the "Act"). Since 1986, AIA members have been named in over sixty actions under the Act, and AIA members are currently involved in over thirty *qui tam* actions brought under the Act. More than three and one-half billion dollars are claimed as damages in pending cases against AIA members involving the issue of whether the 1986 False Claims Amendments Act, Pub. L. No. 99-563, 100 Stat. 3158 (the "1986 Amendments"), in whole or in part, is to be applied retroactively. Therefore, the issues of retroactivity presented in this case are of substantial importance to AIA and its members.

The Electronic Industries Association ("EIA") is a national organization of more than twelve hundred companies involved in the development and production of televisions, radios, computers, telecommunications devices, radars, avionics, and other military and commercial electronic equipment. Many of its members derive revenue from sales to the United States Department of Defense and other Government agencies. One role of EIA is to serve as a spokesman for the dissemination of its members' views on important Government procurement issues.

The members of EIA who contract with the Federal Government are exposed to claims under the Act. A number of EIA's members have had to defend False Claims Act allegations or are currently defending such allegations, including cases involving the retroactivity of the 1986 Amendments.

The members of AIA and EIA are thus directly affected by whether any provisions of the 1986 Amendments apply to pre-enactment conduct.

II

GRANTING CERTIORARI IN THIS CASE WILL RESOLVE LEGAL ISSUES OF CRITICAL IMPORTANCE TO *AMICI* AND OTHER GOVERNMENT CONTRACTORS.

The conflict among the circuits concerning the retroactive effect of the 1986 Amendments warrants review by this Court in order to clarify the effect of those Amendments; to establish when a statute is one indivisible unit for retroactivity purposes; and to explain when statutes that are jurisdictional or procedural in form, but alter substantive rights, may be applied retroactively.

The Act is the principal statutory basis used by the Government and by *qui tam* relators to allege fraud by government contractors. Government contractors across the

country face unwarranted uncertainty under the Act because lower courts disagree as to how the Act applies to pre-1986 conduct. A decision by this Court clarifying whether the Act applies to pre-1986 contractor conduct will provide guidance to existing and potential defendants, discourage forum shopping by *qui tam* plaintiffs, resolve an important issue that is pending in the lower federal courts, and significantly assist all courts in their analysis of retroactivity issues.

The problem of whether any provisions of the 1986 Amendments may be applied to pre-enactment conduct, without having an impermissible retroactive effect, arises in many contexts and remains an important issue for the federal courts. The following cases, some involving members of *amici*, illustrate the variety of circumstances in which this problem is presented and is still pending in the lower federal courts.

1. ***Hyatt v. Northrop Corp.***, Nos. 94-55638, 94-55578 (9th Cir.) (pending). In *Hyatt*, the Government acquired the information pleaded in the *qui tam* complaint and the relator filed the *qui tam* action before Congress enacted the 1986 Amendments. The *qui tam* relator alleges that Northrop submitted false claims in violation of the Act in connection with the design, development, and manufacture of the MX Peacekeeper missile program. The Government investigated the relator's allegations, declined to intervene, and recommended that the court dismiss the *qui tam* action because of the Government's prior knowledge. The district court dismissed the *qui tam* claims. In a pending appeal, the *qui tam* relator relies on recent decisions from the Ninth Circuit in seeking to revive his *qui tam* claims and asserts a claim for reinstatement under the 1986 Amendments' new whistleblower remedy. The Ninth Circuit heard oral argument in September 1995 but has not yet released any decision.

2. ***United States ex rel. Haycock v. Hughes Aircraft Company***, Nos. 94-55620 & 94-55826 (9th Cir.) (pending). In *Haycock*, the *qui tam* relator alleged that, between 1983 and 1987, Hughes Aircraft Company violated the Act by charging the labor hours of certain employees working in Hughes' Systems Engineering Laboratory to direct cost-pool accounts rather than to indirect or overhead accounts. Hughes filed concurrently (1) a motion to dismiss portions of the complaint based, in part, on the pre-1986 statute of limitations in the Act and (2) a motion for summary judgment. The district court granted Hughes' motion for summary judgment and, therefore, declined to rule on the retroactivity issue raised in Hughes' motion to dismiss. The relator appealed the district court's decision granting summary judgment. On September 15, 1995, the Ninth Circuit heard oral argument, but has not yet issued a decision. If the district court's ruling is reversed, it will be forced to address the retroactivity issue.

3. ***United States ex rel. Lindenthal v. General Dynamics Corp.***, 61 F.3d 1402 (9th Cir. 1995). The relator alleged *qui tam* claims against General Dynamics arising from the design of the MUTES system, which the Air Force uses to train pilots. The district court found that the Government had knowledge forming the basis for the claim before the 1986 Amendments, but applied the 1986 Amendments to preserve the relator's claims. It found in favor of General Dynamics at the trial and awarded costs in favor of General Dynamics. The Ninth Circuit affirmed. On October 4, 1995, it denied the relator's petition for rehearing and suggestion of rehearing en banc. A petition for certiorari may be filed in this case.

4. ***United States ex rel. Schumer v. Hughes Aircraft Company***, 63 F.3d 1512 (9th Cir. 1995). In *Schumer*, the *qui tam* relator alleged that Hughes Aircraft made false claims in connection with programs for the development of radar

systems for the F-14, F-15, F-18, and B-2 aircraft for the Air Force. The allegedly false claims were submitted before 1986 and the Government was aware of the allegations on which the *qui tam* action was based before Congress passed the 1986 Amendments. The relator filed his lawsuit in 1989. The district court applied the 1986 Amendments to these claims and the Ninth Circuit affirmed that ruling on August 2, 1995. Hughes Aircraft's petition for rehearing and suggestion of rehearing en banc is pending.

5. ***Boisvert v. FMC Corp.***, No. C-86-20613 (N.D. Calif), 1987 U.S. Dist. LEXIS 13549 (September 8, 1987). The *qui tam* relator alleged that FMC submitted false claims in connection with the production of the Bradley Fighting Vehicle. The relator filed his case on September 9, 1986. The district court held in 1987 that the 1986 Amendments should not be applied and that the Government-knowledge defense of the pre-1986 Act applied to the case. In 1987, the United States filed an *amicus* brief in that case advocating that the 1986 Amendments' *qui tam* provisions should not be applied retroactively. 1987 U.S. Dist. LEXIS 13549, at *2. The False Claims Act claims in that case are still pending in the district court.

6. ***United States ex rel. Newsham v. Lockheed Missiles and Space Company, Inc.***, No. C 88-20009 JW (N.D. Calif.), 1995 WL 241444 (April 20, 1995). The *qui tam* relator alleged that Lockheed engaged in false charging of labor hours to Government contracts between 1981 and 1984. She notified the Government of her allegations in 1984 and filed her *qui tam* action in 1988. The district court has held that the 1986 Amendments apply to these claims and twice has rejected Lockheed's arguments that the Government-knowledge defense bars these claims. This case is still pending before the district court.

7. ***United States ex rel. Peterson & Kroll v. Northrop Corporation***, No. CV 87-3698 KN (C.D. Calif.). This *qui tam* case was filed in 1987. The *qui tam* relator alleges defective pricing and mischarging in connection with the MX Peacekeeper missile program. The Government intervened in part of the case. The claims allege both pre-1986 and post-1986 Government-contractor conduct. In a September 2, 1994 order on Northrop's motion for partial summary judgment, the district court applied *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and other decisions and held that some portions of the 1986 Amendments will be applied to Northrop's pre-1986 conduct, while others will not. The preponderance-of-the-evidence standard of the 1986 Amendments will apply, but the reduced scienter standard, no longer requiring specific intent and knowledge of the falsity, as well as the increased penalty provisions of the 1986 Amendments, will not apply.

8. ***United States v. TDC Management Corp.***, No. CIV A 89-1533 (D.D.C.). The Government filed this case under the Act alleging that TDC submitted false claims to the Urban Mass Transit Administration. The alleged false claims were submitted before 1986. The U.S. Court of Appeals for the District of Columbia Circuit held that the civil penalty and double damages provisions of the pre-1986 version of the Act, rather than the 1986 Amendments, govern this case because the 1986 Amendments "clearly expand the potential scope of liability under the Act." 24 F.3d 292, 298 (D.C. Cir. 1994). The court of appeals did not reach the Government's contentions about the retroactivity of the 1986 Amendments' scienter requirement. *Id.* The case is currently pending before the district court on remand from the D.C. Circuit.

9. ***United States v. Incorporated Village of Island Park***, 888 F.Supp. 419, 444 (E.D.N.Y. 1995). The Government brought this case under the Act based on claims submitted in 1984. The district court has held in an interim

ruling on motions for summary judgment that the 1986 Amendments should not be applied retroactively to these claims. The case is pending in the district court.

The foregoing cases demonstrate the various circumstances in which courts are still struggling with the question of whether the 1986 Amendments may apply retroactively. Furthermore, because the 1986 Amendments adopted a statute of limitations potentially as long as ten years after the violation is committed, 31 U.S.C. § 3731(b) (Supp. V 1987), future lawsuits presenting the retroactivity issue can still be filed. A decision in the instant case also will assist in such as-yet unfiled cases.

AIA and EIA believe that it is important for the Court to grant certiorari here to consider the issues raised by Northern Telecom's petition. The lower courts have reached inconsistent results and will continue to do so in pending cases, which are likely to take several years to resolve. Now is the appropriate time to address the retroactivity issue common among these cases, while also providing further clarification about retroactivity principles that will guide the lower courts in cases involving many other statutes.

CONCLUSION

AIA and EIA urge the Court to grant Northern Telecom's petition for a writ of certiorari.

October 25, 1995

Respectfully submitted,

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